Public Service Electric and Gas Company *and* Utility Co-Workers Association. Case 22-CA-11664

28 March 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 8 September 1983 Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed a brief in oppsition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to make a negotiated wage increase retroactive. The Respondent excepts to this finding and contends, inter alia, that the Union bargained away or waived its rights to retroactivity by entering into the collective-bargaining agreement reached by the parties on 10 May 1982.[2] We agree with the Respondent that the Union bargained away its right to retroactivity with regard to the wage increases.

Since about 1949, the Union has represented a unit of the Respondent's clerical employees. Article XX of the collective-bargaining agreement between the parties, effective 1 May 1980 through 30 April 1982, stated:

> During negotiations following such written notice, this Agreement shall continue in effect; and such new or amended Agreement as shall result from such negotiations shall be retroactive to the date of expiration of this Agreement.

The Respondent and the Union held their first bargaining session for a new 2-year collective-bargaining agreement on 19 February. On 14 or 15 April the Respondent presented its first settlement package and stated to the Union that it would be willing to give a 7-percent wage increase, but that the package would be effective 1 May or the date of ratification, whichever came later. Jerry Bello, vice president of the Union and a member of its negotiating team, advised Roland Stickle, Respondent's manager of industrial relations and head of its negotiating team, that article XX of the collective-bargaining agreement (then in effect) required that the raise be retroactive. There were several more negotiating sessions and at each session Bello brought up the issue of retroactivity and Stickle replied that there would be no retroactivity.

On 26 April the Respondent submitted its final package to the Union. Stickle again told the Union that the wage offer (a 7-1/2-percent raise) was effective 1 May or the date of ratification, whichever was later. Bello again reminded the Respondent of article XX.

On 6 May Bello met with state and Federal mediators on the outstanding issues and told them of the importance of the retroactivity issue to the Union's membership. There is no evidence that the Union discussed the retroactivity issue directly with the Respondent on this date. In a "Negotiations Update" dated 7 May the Union stressed the importance of retroactivity to the membership.

The next time the Union and the Respondent met was on 10 May at which time some revisions were made in the package and agreement was reached. That same morning, before the meeting, Bello sent the Respondent a mailgram stating in pertinent part:

> Let me reiterate through this communication our Union's position and understanding regarding the continuance of our agreement dated May 1, 1980 and the company's contractual obligation to pay retroactively any wage/-salary increase from April 30, 1982 . . . . The Agreement provides for the results from such negotiations to be retroactive, therefore, for over 30 years both parties have never had a problem in this area and we don't expect any this year. That is to say, we expect our negotiated changes in the area of wage increases to be retroactive to April 30, 1982.

Bello neither mentioned the mailgram to Stickle nor presented him with a copy of the mailgram at the 10 May meeting; Stickle had no knowledge of the mailgram until he received it on 13 May.

The collective-bargaining agreement[3] was presented to the membership and ratified on 19 May.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1982, unless otherwise indicated.

[3] There are actually three separate but substantially identical collective-bargaining agreements for three groups of employees: customer and marketing services, building maintenance department; telephone services department; and customer and marketing services department locations.

When voting the membership was fully informed that the agreement did not provide for retroactivity with respect to wages. On 26 May the collective-bargaining agreement was returned by Bello to Stickle with a cover letter stating that the Union reserved all rights it may have concerning the issue of retroactivity, notwithstanding ratification of the agreement. The agreement states at paragraph 1:

> A general wage increase of 7.500% effective May 1, 1982 or date of ratification, whichever is later.

Based on the Board's decision in *Henry T. Siegel Co.*, 147 NLRB 594 (1964), enfd. 340 F.2d 309 (2d Cir. 1965), the judge concluded that the Union did not waive its position on retroactivity despite the fact it entered into the collective-bargaining agreement. The judge noted that the Union pressed the issue throughout the negotiations and thus found it did not waive the issue by "signing up for the best it can get."

We disagree and find the judge's reliance on the *Siegel* case to be misplaced. In *Siegel*, the union, both before and after execution of the collective-bargaining agreement, pressed the respondent to include language in the contract which would express its previous oral commitment that a 12-1/2 percent incentive factor would continue to be used in the computation of piece rates. The Board held that since the respondent had clearly orally agreed to include such a provision in the contract the union had not waived its right to insist on the inclusion of that provision by its execution and acceptance of the contract.

The instant case presents a different situation. The Respondent offered the Union a package which included a wage increase without retroactivity. The Union expressed its disagreement and insisted that the wage provisions be made retroactive to the expired agreement. The Respondent, however, was as equally adamant that there would be no retroactivity and maintained that position both before and after the parties reached accord on the terms of the new agreement. Significantly, that agreement specifically provided for no retroactivity and, in that form, was ratified by the membership and executed by the Union. The Union's execution of the new collective-bargaining agreement containing a provision that specifically excluded retroactivity made article XX of the prior collective-bargaining agreement a nullity as to that provision. Thus, the Union by ultimately accepting the contract bargained away its claim to retroactivity with respect to wages.[4]

We so find and therefore conclude that the Respondent did not violate Section 8(a)(5) and (1) of the Act by not making the wage increase retroactive. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me at Newark, New Jersey, on April 11, 1983. Upon a charge filed on June 2, 1982,[1] a complaint was issued on November 15, alleging that Public Service Electric and Gas Company (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by all parties.

On the entire record of the case, including my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation with an office and place of business in Newark, New Jersey, is engaged in the purchase, production, transmission, storage, sale, and distribution of natural gas and electricity. During the 12 months preceding the issuance of the complaint, Respondent's gross revenues were in excess of $250,000. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

Utility Co-Workers Association (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Issue*

The issue in this proceeding is whether Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay a wage increase retroactively.

B. *The Facts*

1. Background

Since at least 1949 the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

[4] See *L. C. Cassidy & Sons*, 185 NLRB 920 (1970).

[1] All dates refer to 1982 unless otherwise specified.

> All employees of the Company's District Offices, Customer Payment Processing Center and Customer Inquiry and Accounting Centers, except employees in supervisory, confidential and Marketing Services Department positions.

Article XX of the collective-bargaining agreement between the Union and Respondent, effective May 1, 1980, through April 30, 1982, provides as follows:

> During negotiations following such written notice, this Agreement shall continue in effect; and such new or amended Agreement as shall result from such negotiations shall be retroactive to the date of expiration of this Agreement.

2. Negotiations through April 26

Jerry M. Bello, vice president of the Union, testified that the first negotiating session for the new contract was held on February 19. He further testified that Respondent presented its first settlement package on April 14. It was at this time that Respondent stated that it would be willing to give a 7-percent raise. However, Respondent also stated that the package would be effective May 1 or the date of ratification, whichever came later. Bello credibly testified that he advised Roland Stickle, Respondent's representative, that this was not satisfactory, inasmuch as article XX requires that the raise be retroactive. Bello further testified that negotiating sessions were held every few days thereafter, that he brought up the issue of retroactivity and that at each session Stickle replied that there would be no retroactivity.

Bello testified that Respondent presented its second package on April 26 and that Stickle again stated that there would be no retroactivity. Bello testified that he again reminded Respondent of article XX and that "our agreement was a continuing one and any settlement that was reached, any agreement by membership, would be retroactive."

Stickle, Respondent's manager of industrial relations, testified that the Company decided that in 1982 it would not follow its prior policy of paying wage increases retroactively. He testified that on April 15 he put the settlement package on the table and stated that any increase in wages would be effective May 1 or the date of ratification, whichever was later. Stickle further testified that the issue of retroactivity was discussed at the negotiating session of April 16, but was not discussed at the sessions held April 19, 20, 21, 22, and 25.

Stickle testified that he again met with the union representatives on April 26, at which time he submitted the Company's "final" package. The package contained a proposed 7-1/2 percent raise. Stickle testified that he again told the Union that the wage offer was effective May 1 or the date of ratification, whichever was later. When asked whether Bello expressed his opposition to the lack of retroactivity, Stickle replied "he may very well have in that when I mentioned wages he may have reacted that way, taking opposition to the lack of retroactivity."

Based on the above, I find that, as early as April 16, Respondent made it very clear to the Union that the raise would be as of May 1 or the date of ratification, whichever was later. The evidence is conflicting as to whether the issue of retroactivity was brought up at each negotiating session. However, I find that Bello expressed his opposition to the Company's position on April 16 and 26 and each time when wages were discussed.

3. Events after April 26

The record contains a "Negotiations Update," dated May 7, informing the union membership that on May 6 Bello told the state and Federal mediators of the "importance of retroactivity to our membership." The memorandum continues:

> One area of tremendous importance of the UCA is RETROACTIVITY. Your Negotiating Committee has discussed this area continually, especially during our meeting on May 6th. [T]he Company is hard and firm in claiming that no bargaining unit employee would be paid any retroactive pay. Your UCA Agreement guarantees retroactive pay, yet the Company refuses to recognize this fact.

The next time that the Union and Respondent met face to face was on May 10, at which time some revisions were made in the package and agreement was reached. Prior to this meeting, on the morning of May 10, Bello sent a mailgram to Respondent which stated, in pertinent part:

> Let me reiterate through this communication our Union's position and understanding regarding the continuance of our agreement dated May 1, 1980 and the company's contractual obligation to pay retroactively any wage/salary increase from April 30, 1982 . . . .
>
> The Agreement provides for the results from such negotiations to be retroactive, therefore, for over 30 years both parties have never had a problem in this area and we don't expect any this year. That is to say, we expect our negotiated changes in the area of wage increases to be retroactive to April 30, 1982.

Bello recognized that a mailgram is sent by mail and, accordingly, would not have been delivered that day. Based on the testimony of Bello and Stickle, I find that Bello did not give a copy of the mailgram to Stickle, nor did he advise Respondent of the text of the mailgram. Stickle did not receive the mailgram until May 13, nor did he know about it until that time.

C. *Discussion and Analysis*

In *Henry I. Siegel Co.*, 147 NLRB 594 (1964), enfd. 340 F.2d 309 (2d Cir. 1965), the Board held that the employer violated Section 8(a)(5) and (1) of the Act by refusing to include in a contract a clause to which it had previously agreed. In enforcing the Board's Order, the United States Court of Appeals for the Second Circuit stated (340 F.2d at 310):

> A claim of "waiver" with respect to charges of refusal to bargain on an issue as to which bargaining is mandatory, or to include in a contract a point on which agreement has in fact been reached, requires some rather nice discriminations. A party faced with a stiff position by its opposite number on such an issue may decide against pressing it, preferring not to jeopardize other advantages it may obtain. It is somewhat misleading to speak of such conduct as a waiver of a refusal to bargain; rather, when the course of the negotiation is considered as a whole, no such refusal was ever consummated.

The court continued (id.):

> But when the issue has been pressed throughout, the party unable to force the other to bargain or to include an agreed provision in the written contract does not "waive" a completed refusal to bargain simply by signing up for the best it can get. It would seriously contravene the basic objective of industrial peace to place such a party in the predicament where it could make a valid charge of an unfair labor practice only if it forewent a contract altogether.

I find that the issue of retroactivity had been "pressed throughout" by the Union during the negotiations. The Union pressed the matter on April 16, again on April 26, and whenever the issue of wages was discussed. The Union further pressed the issue with the mediators on May 6. Finally, in its mailgram of May 10, despite the fact that the contents of the mailgram were not communicated to Respondent until after agreement had been reached, the Union reiterated its position as to retroactivity. I believe that under the *Siegel* case it is clear that the Union did not waive its position by entering into the agreement. Pursuant to that case Respondent's refusal to make the wage increase retroactive constitutes a refusal to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act.[2] See also *Morelli Construction Co.*, 240 NLRB 1190 (1979); *FWD Corp.*, 257 NLRB 1300 (1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees of Respondent's District Officers, Customers Payment Processing Center and Customer Inquiry and Accounting Centers, except employees in supervisory, confidential and Marketing Services Department positions, constitute a unit of employees appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. By failing and refusing on or about May 10, 1982, and continuing to date, to make wage increases retroactive, in accordance with article XX of the collective-bargaining agreement in effect from May 1, 1980, through April 30, 1982, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.
5. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall order Respondent to make whole the employees in the appropriate unit by paying them the amount they would have received had the wage increases been made retroactive. All payments shall be made with interest, computed in accordance with the formula set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

[2] In his brief, the General Counsel urges for the first time that I find Respondent violated Sec. 8(a)(5) by insisting that the Union agree to waive retroactivity. At no time was the complaint amended to include this allegation nor was any mention made of this prior to the request in the brief. In view of these circumstances, I believe that Respondent was not given an adequate opportunity to respond and that the matter has not been fully litigated. Accordingly, I decline to find the additional violation. See *Chandler Motors*, 236 NLRB 1565 (1978); *Datagraphic, Inc.*, 259 NLRB 1285, 1290 (1982).